Nos. 14945-14946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a corporation, and THE OJAI VALLEY COMPANY, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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Erratum.

Appellant, in his Opening Brief, inadvertently stated, on page 2 thereof, that the First Amended Complaint in Appeal No. 14945 contained the words ". . . the action is not collusive to confer jurisdiction on the Federal Courts." This language is in the complaint in Appeal No. 14946, not in 14945.

Such language is not required by the Federal Rules of Civil Procedure in Appeal No. 14945, it not being a derivative or secondary action; however, such language is required by Rule 23(b) Federal Rules of Civil Procedure in a derivative or secondary action, and thus is included in the complaint in Appeal No. 14946.

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APPELLANT'S REPLY BRIEF.

I.

THEORY OF THE COMPLAINTS.

The Complaints and Each Cause of Action Thereof State Claims Upon Which Relief Can Be Granted.

Appellees, in their Brief, have both oversimplified and misconstrued the pleadings.

A. Appeal No. 14945.

FIRST CAUSE OF ACTION.

Appellant fully pleaded the facts entitling him to relief (as abstracted in App. Op. Br. commencing at p. 4). From these averments, a court sitting in equity is entitled, both in fact and in law, to conclude that there was a fraudulent overreaching by The Ojai Valley Company as controlling stockholder of Ojai Mutual Water Company. The attempted 1935 amendment to the Articles of Incorporation was void, not only for lack of notice of the meeting at which it was purportedly passed, as required by law, but also because it was an improper and inequitable use of an interlocking directorate and majority control to perpetuate, by an unlawful device, that same

control—all within the meaning of such cases as *Pepper v. Litton,* 308 U. S. 295; *Southern Pacific Company v. Bogert,* 250 U. S. 483; *Subin v. Goldsmith,* 224 F. 2d 753; *Perlman v. Feldmann,* 219 F. 2d 173. These and many other cases are cited in Appellant's Opening Brief. Further, since contrary to Articles and By-laws there had never been any stock assessments, The Ojai Valley Company had, in effect, through water dues alone, compelled the minority stockholders to pay for substantial capital improvements to Ojai Mutual Water Company and thus increase the value of The Ojai Valley Company's large block of control shares at no expense to this same The Ojai Valley Company. In addition, The Ojai Valley Company has put itself in a position to realize an excessive and unwarranted profit to the promoters of the Water Company to the detriment of the grantees of these same promoters and The Ojai Valley Company.

The Articles of Incorporation of the Water Company [Tr. Rec. pp. 30 and 31] provide:

> "This company is *not* authorized to engage in the business of selling, dealing in or distributing said or any water *for profit,* or for compensation, or as a public service corporation, and none of its waters shall ever be for sale, rental or distribution, and *for the delivery of said water to them by said company said stockholders shall pay only such an amount as may be sufficient to pay the cost of management, maintenance and operation of the company and for the delivery of said water to them.*" (Emphasis added.)

SECOND CAUSE OF ACTION.

The second cause of action pleads by inclusion the facts alleged in the first cause of action, and then pleads facts showing an express contract between both Appellee corporations and the grantees of The Ojai Valley Company who are minority stockholders of Ojai Mutual Water

Company that such water would be used only on The Ojai Valley Company and Libbey lands, etc. Also, additional facts are alleged from which such a contract between them may be implied in fact and in law. See, for example, the language quoted in Appellant's Opening Brief on page 31, from *Prosole v. Steamboat Canal Company,* 37 Nev. 154, 140 Pac. 720. The allegations in the second paragraph of said second cause of action [Tr. Rec. p. 15] is almost verbatim the language in the concurring opinion of Shaw, *J.*, in *Butte County Water Users Association v. Railroad Commission,* 185 Cal. 218, at p. 235.

THIRD CAUSE OF ACTION.

The third cause of action was dismissed upon Appellant's own motion, by stipulation, because said third cause of action was necessarily included in the first cause of action.

FOURTH CAUSE OF ACTION.

After pleading by inclusion the facts previously alleged, Appellant sets forth the trust relationship and the "*alter ego*" status of The Ojai Valley Company and its promoters, and alleges a breach of the trust relationship, using the theory of *Copeland v. Fairview Land and Water Company,* 165 Cal. 148; *Imperial Water Company No. 5 v. Holabird,* 197 Fed. 4, and other cases cited in Appellant's Opening Brief commencing on page 32.

FIFTH CAUSE OF ACTION.

Appellees in their Brief have incorrectly stated the facts alleged in saying that Appellant contends that "no others have any rights to the use of this water."

This is exactly the opposite of the truth. Appellant specifically alleges that the Water Company's water is imported from an underground source more than two miles away, that there are numerous other users from the Basin who also have rights to this water, and that the water supply is critically short. [Tr. Rec. pp. 19,

20 and 21.] Appellant earnestly contends that no outside interest should be permitted to purchase the large block of stock now held by The Ojai Valley Company which is the promoters' *alter ego,* since it would be detrimental to its own and the promoters' grantees, of whom this Appellant is one.

SIXTH CAUSE OF ACTION.

Again Appellees are incorrect in their statement of Appellant's averments.

Appellant clearly and concisely alleges [Tr. Rec. p. 21, II and III] that as between The Ojai Valley Company, the grantees of The Ojai Valley Company and the Libbey Interests, and the Water Company itself, said shares have been made, and are treated as, appurtenant to the land granted to the shareholders by The Ojai Valley Company and the Libbey Interests, and that The Ojai Valley Company has improperly and in violation thereof treated its own shares as personalty and thus freely transferable.

Appellees have consistently argued and contended that, since the Articles of Incorporation do not specify that the shares are appurtenant to specific land, such cannot possibly be the case, and they quote at length from the case of *Palo Verde Land and Water Company v. Edwards,* 82 Cal. App. 52, commencing on page 39 of Appellees' Brief.

But in Appellees' own case the Court clearly admits that compliance with Section 324 of the Civil Code is *not* required:

> "Nor is there any evidence in the record showing that the Water Company by its acts or practices held the water stock to be appurtenant to the land upon which it is located."

Since Appellant has alleged that the shares have in fact and by agreement been treated as appurtenant to specific land, he is surely entitled to prove said allegations on a fair trial.

On page 41 of their Brief, Appellees cite, and quote from, the case of *Wheat v. Thomas,* 209 Cal. 306, as follows:

> "The right of a stockholder in a mutual water company to receive water by virtue of his ownership of stock is real property but the shares themselves are personalty and do not pass upon a conveyance of land *unless they are appurtenant* thereto; they *may* become appurtenant by the adoption of appropriate provisions in the By-Laws of the water company under Section 324 of the Civil Code, but *one claiming that they are appurtenant, is required to prove it.*" (Citing many cases; Emphasis added.)

Appellant is anxious to do just exactly this—he wants the opportunity to prove that the shares are appurtenant, as is permitted even by the authorities which Appellees cite. Appurtenancy is a mixed question of law and fact. This, it is submitted, is not a matter to be decided upon motion to exclude evidence or to dismiss.

SEVENTH CAUSE OF ACTION.

The allegations in Appellant's seventh cause of action set forth Appellant's right to a declaration of rights, since there is clearly a controversy.

B. Appeal No. 14946.

As Appellees point out in their Brief (p. 6 thereof), the complaint in Appeal No. 14946 alleges discrimination on the part of Ojai Mutual Water Company, while in control of The Ojai Valley Company, in furnishing and delivering water to its consumers, claiming that certain consumers have been receiving water at a lower cost than other consumers. Appellant also specifically, and in detail, alleges fraud.

Whether or not these facts exist is a matter for the trial court to decide after all the evidence has been introduced.

II.
APPELLEES' PLEADED DEFENSES.

Appellees' Pleaded Defenses Require a Trial on the Merits to Determine Their Validity.

Appellees by general denial directly put in issue many of the facts alleged in Appellant's two complaints and each and every cause of action therein.

With the exception of the one narrow issue of fact (as to whether or not proper notice had been given), the question of the truth of facts pleaded in the complaints is not before this Court. We are here on the question of sufficiency of the complaints, and must assume that all facts therein well pleaded are true. Thus, Appellees' many and lengthy denials of the truth of the facts alleged are totally immaterial on appeal and are unduly burdensome to the record [for example, see Tr. Rec. pp. 277 to 287, incl., and most of the points and arguments made by Appellees in their Brief, to which we will refer later].

As to the sixth defense of Appellees, most of the matter therein alleged [Tr. Rec. p. 69 *et seq.*] are pure matters of fact, which are by Rule 8(d) Federal Rules of Civil Procedure deemed controverted by Appellant, and upon which a trial should be had to determine their truth.

Both in said sixth separate defense, and in their seventh separate defense, Appellees have apparently tried to set up an estoppel.

But an analysis of Appellees' position clearly shows that the exact opposite of an estoppel is shown by the facts pleaded. Rather than being detrimental to Appellee The Ojai Valley Company, The Ojai Valley Company by reason of Appellant's alleged inaction has actually made more stock sales and more land sales, and thus has improved its position financially many times over.

Appellant is not now trying, nor has he ever tried, to deprive any present bona fide user of Ojai Mutual Water Company service.

Appellant's entire position has been remedial in nature: He is asking the Court to prevent further or additional wrongs.

These are actions in the nature of bills *quia timet*, to prevent threatened additional injury.

In pleading waiver, acquiescence and consent in their eighth and ninth separate defenses, Appellees have totally ignored the principles enunciated by the court in *Imperial Water District No. 5 v. Holabird, supra.* Since this is the only adequate source of water [Tr. Rec. p. 12, XV], the mere acceptance of water service cannot be construed as a waiver, acquiescence or consent to the fraudulent overreaching and breaches of trust perpetrated by appellee The Ojai Valley Company upon the minority stockholders of Ojai Mutual Water Company. And the court so held in the *Holabird* case, *supra.*

III.

THE ARTICLES OF INCORPORATION.

Appellant Properly Pleaded the Articles of Incorporation of Ojai Mutual Water Company.

Appellees contend that the Articles of Incorporation and the By-Laws of the corporation are the total measure by which the rights, duties and liabilities of the corporation and its stockholders are defined, and even contend that a pleading of the Articles of Incorporation by Appellant binds Appellant to the express language of the Articles and precludes Appellant from showing any further agreements.

Needless to say, if Appellees were correct in such contention, all corporate litigation would resolve itself into an interpretation of the Articles and By-Laws. The many, many cases cited by Appellant of course show this to be a false concept.

Actually, the very fact that the Articles permit a service area of 2,675 acres shows why Appellant and the other minority stockholders similarly situated need protection from this Court. Appellant, as hereinabove set forth, clearly alleged that there was never any intention to serve more than approximately 500 acres of land. [Tr. Rec. p. 9.]

The Articles of Incorporation, by authorizing 3,000 shares, on the basis of one share per one-quarter acre of land, would not possibly permit a servicing of more than 750 acres; and indeed, the original and *only* issue of shares, numbering 2,003 shares, at one share per one-quarter acre of land, would not permit the servicing of more than about 500 acres.

The Articles were pleaded also to give a foundation for Appellant to show in what respects the actual contract with the stockholders is different; the Articles are necessary as background information, but the complaint goes on specifically and in considerable detail to explain what the actual contract between the corporation and its stockholders consists of.

IV.

THE FINDINGS OF FACT WITH RESPECT TO NOTICE.

The Statutory Presumption of Regularity Fails in the Face of Substantial Evidence.

As stated by Appellant in his Opening Brief, commencing at page 19, the testimony was clear, convincing and absolutely unrefuted that no notice of the 1935 meeting had been given at which the 1935 amendment to the Articles of Incorporation of Ojai Mutual Water Company was purportedly passed. Even Mr. Harmon, an adverse witness and an officer, director and stockholder of Ojai Mutual Water Company, stated that he not only did *not* receive any notice, but that "we don't send them out, generally speaking", and that it was his understand-

ing that no notice is required to be sent out of the annual meeting of stockholders. [Tr. Rec. pp. 222, 227 and 228.]

Appellees, in their Brief (commencing at p. 15), cite many sections of the Code of Civil Procedure of the State of California with reference to the matter of statutory presumption and the effect thereof.

It is our understanding, however, that matters of evidence are procedural, and that therefore the Federal law—not the State law—of evidence applies. See *Ariasi v. Orient Insurance Company,* 50 F. 2d 548, cited in Appellant's Opening Brief at page 21.

Regardless of Appellees' arguments to the contrary, Section 362b of the California Civil Code constitutes no more than a statutory presumption, and therefore the *Ariasi* case applies. And thus, in the face of actual, substantial evidence, the statutory presumption must fall.

V.

BOTH NO. 14945 AND NO. 14946 ARE PROPERLY PLEADED CLASS SUITS.

Appellees, in their Brief, do not cite authorities or even attempt to meet the points made in Appellant's Opening Brief, pages 22 and 23 thereof.

Appellees do, however, obliquely challenge Appellant's compliance with Rule 23(b) Federal Rules of Civil Procedure by stating—incorrectly—that

> "Appellant entirely failed to set forth with particularity the efforts of Appellant to secure from the managing director or trustees and if necessary from the shareholders such action as he desired . . ."

In the first place, such allegation is required only in a secondary, or derivative, action by a shareholder (Rule 23(b) Federal Rules of Civil Procedure). Appeal No. 14945 is not a derivative or secondary action, but is brought in the individual and primary right of Appellant

and set forth in the First Amended Complaint. [Tr. Rec. p. 3 *et seq.*]

As for Appeal No. 14946, Appellant very clearly and completely alleged [Tr. Rec. p. 5, Subparagraph (d)] that with common directors, and complete voting control of the Water Company being in The Ojai Valley Company, and in view of the allegations thereafter contained and the allegations contained in plaintiff's First Amended Complaint (being Appeal No. 14945), any demand upon the defendants The Ojai Valley Company and Ojai Mutual Water Company would be useless and of no benefit. Thereafter, Appellant alleged in said complaint the facts entitling the minority stockholders to relief, that the attempted amendment to the Articles of Incorporation in 1935, and the amendment of the By-Laws in accordance therewith, was "void as being unreasonable and inequitable and a fraudulent device to retain control of the Water Company by said The Ojai Valley Company . . ." [Tr. Rec. p. 23.] It is the established rule that where actual fraud on the part of the controlling interests of a corporation is alleged, or when demand would be otherwise useless, formal demand is not necessary. (*Smith v. Dorn,* 96 Cal. 73; *Cohen v. Industrial Finance Corp.,* 44 Fed. Supp. 491; *Gottesfeld v. Richmaid Ice Cream Co.,* 115 Cal. App. 2d 854.)

In Appeal No. 14945, referred to as aforesaid in the complaint in Appeal No. 14946, Appellant had alleged with particularity his efforts to get Mr. C. J. Wilcox, "the chief executive officer of both defendants and of the trustees of the estate of Edward D. Libbey", to have the surplus Ojai Mutual Water Company shares canceled or placed in trust for the individual owners, etc. [Tr. Rec. pp. 13 and 14], and then alleged that the said C. J. Wilcox refused and neglected to act on said demands. Mr. Wilcox was the President and Treasurer of both of Appellee corporations, and a director of both corporations, and had been such since 1925 and before [Tr. Rec.

pp. 189, 190], and was one of six trustees of the estate (of Edward D. Libbey) and the manager thereof [Tr. Rec. p. 190], and was the person to whom "the other people in the corporation back in Toledo have left things generally up to . . ." [Tr. Rec. p. 195.]

Appellees thereafter state that Appellant "makes no allegation in his complaint that he has made any demand upon any of the minority shareholders . . ." This would have been so patently and utterly fruitless as to be ridiculous.

VI.

APPELLEES' "CONCLUSION."

Such "Conclusion" Reveals No Basis for Sustaining the Judgments of the District Court.

On pages 51, 52 and 53 of their Brief, Appellees have written their "Conclusion", which is a fair summary of their position on appeal.

Rather than attempting to answer the inconsistencies and irrelevancies contained in Appellees' Brief, line by line, and page by page, Appellant will answer Appellees' "Conclusion" instead.

Such "Conclusion" makes nine points:

The *first point* attempts to limit Appellant to the Articles and By-Laws to define the rights, duties and liabilities of the parties.

But in addition to our observations in Section III above, the District defined by the Articles of Incorporation is of course permissive in character; there is no obligation on the part of the Water Company to supply all of these 2,675 acres, even if the Water Company were able to do so. It is not a public utility or "a public service corporation." [Art. of Incorporation, Tr. Rec. p. 31.]

The By-Laws of the Water Company [Tr. Rec. p. 15, Appeal No. 14946] do not permit servicing of additional lands if such additional service would interfere with or

limit the supply of water to be furnished to the lands covered by the schedule or schedules in force at the time. In view of Appellees' allegations of water shortage, we arrive again at a pure question of fact—that of adequacy of water supply.

Further, as between these two Appellee corporations and their common promoters on the one hand, and the Appellant and other minority shareholders on the other, the contract as evidenced by the Articles and By-Laws was modified by other expressed agreements, and agreements implied in fact and in law, all as fully and completely set forth in both complaints. Also, as has been pointed out in Appellant's Opening Brief, Appellees are *estopped* to assert, for example, that The Ojai Valley Company's shares in the Water Company are freely transferable.

The *second, third,* and *eighth points,* and the first half of the *ninth point* made by Appellees merely attempt to controvert facts well pleaded in the complaints, by arguing matter not in evidence. As stated in Opening Brief, we are before this Court of Appeals on the sufficiency of the complaints (except for one narrow issue of fact, that of notice).

Appellees, in their motions to dismiss, expressly admitted all facts well pleaded. [Tr. Rec. pp. 173 and 175.]

The *fourth point,* of course, assumes that The Ojai Valley Company shares are freely transferable, that they are not appurtenant by agreement or by operation of law, that The Ojai Valley Company is not estopped to assert that said shares are freely transferable, and that The Ojai Valley Company owes no duty to its grantees to refrain from selling its control shares to whomever it wishes, even though such sale would result in insufficient water supply to the properties already sold to these grantees by The Ojai Valley Company.

These assumptions are questions of fact, or mixed questions of fact and law, which can only be decided after all of the evidence is in, on a proper trial of the issues.

Thus, Appellees beg most of the vital questions to be decided on trial; they base their conclusion on a false premise.

The *fifth point* made by Appellees in their Brief shows that Appellees have blinded themselves to the very matters of which Appellant complained and the damage and threats of further damage already evident in The Ojai Valley Company's entire scheme to perpetuate control.

How can Appellees state that "the mere fact that The Ojai Valley Company can transfer these shares of stock to anyone it chooses is meaningless . . ."? As fully alleged in the complaints, this Water Company is the only source of water supply for many homes. There is a critical water shortage, and the Water Company is unable to extend its distribution system in any manner without depriving property owners of vital water supply. [Tr. Rec. pp. 12 and 20.] Simple arithmetic makes it apparent that if the water users are approximately trebled by dumping 1,300 surplus shares on the market, the existing users must suffer by reason of the fact that there is not possibly enough water to go around. The fact that there are a total of 2,675 acres which the Water Company might attempt to service (whereas at the present time only about 600 or so acres are actually being supplied) clearly shows the threat of water shortage.

Furthermore, as this Court well knows, control is an exceedingly valuable asset. Control would permit further amendments to the Articles of Incorporation, to say nothing of a continuation of the inequities under which existing minority stockholders have already suffered. The cases cited by Appellant in his Opening Brief clearly enunciate the law applicable.

By their *sixth point,* Appellees assert that Appellant is raising, for the first time on appeal, the theory that the

1935 amendment to the Articles of Incorporation was void regardless of whether or not notice of the meeting was given.

But counsel *overlooks* the fact that:

1. The complaint in No. 14946, in Paragraph XVII thereof [Tr. Rec. p. 23], specifically alleges this theory;

2. The first amended complaint in No. 14945 alleges facts upon which such theory can be predicated;

3. In transcript of the record, pages 180 and 181, Appellant stated on opening argument, and therein reiterated, that the 1935 amendment was void regardless of notice, and quoted from the *Bogert* case;

4. In Tr. Rec. pp. 184 and 185, Appellant Lucking argued this very theory at length;

5. In Tr. Rec. p. 207, after objection to counsel's question to Mr. Wilcox, this theory was specifically stated;

6. In Tr. Rec. p. 245 this theory was again specifically referred to;

7. In Tr. Rec. p. 272 once again Appellant let the District Court know that he felt this theory was important.

As to the *seventh point,* wherein Appellees contend that Appellant was guilty of laches, and that the statutes of limitation apply, Appellant states that:

(a) We are involved here with a *vested right,* not a mere contract right, and thus the right cannot be lost by mere passage of time. (*Copeland v. Fairview Land and Water Company, supra.*)

(b) If the 1935 attempted amendment to the Articles was void initially (either for want of statutory notice, or because it was a fraudulent overreaching), it is still void. Mere passage of time does not make valid a void act. (*McDermont v. Anaheim Union Water Company,* 124 Cal. 112.)

(c) Appellant knew nothing of the attempted 1935 amendment until 1948, nor of the practice and cumulative effect of the transfer of one share per acre of land sold by The Ojai Valley Company. Actually, as alleged, Appellant was told by the President of both corporations that four shares per acre on his twenty acre purchase "would make the purchase price of this property on entirely too low a basis" [Tr. Rec. p. 8]; there was no disclosure of the true reason for withholding additional shares.

(d) Repeated demands made of C. J. Wilcox as President, Treasurer and Director of both corporations, commencing in 1948, brought no fruit;

And it was not until Mr. Wilcox's letter of May 24, 1950 that there was a refusal to put the matter before his Board. [Tr. Rec. p. 103.] This was a condition precedent to bringing suit, and without a demand and refusal suit would have been premature. The first complaint was then filed in 1951.

(e) No detriment or change of position by The Ojai Valley Company or Ojai Mutual Water Company as a result of Appellant's inaction (if any) has been alleged or shown. On the contrary, the 1935 device has enabled The Ojai Valley Company to control Ojai Mutual Water Company, and thus not assess its own stock for capital improvements, but instead to make the *users*—its own grantees—pay for the value of these very control shares, all of which is contrary to By-Law and the very nature of *mutual* companies.

(f) There was no threatened bulk sale until about 1949, within Appellant's knowledge. Indeed, the reasonable inference to be derived from Mr. Wilcox's letter of October 4, 1948 [Tr. Rec. p. 94] is exactly the opposite.

(g) Appellee The Ojai Valley Company is in a position of trust, both by reason of its being the *alter ego* of the

promoter of both corporations, and a majority shareholder therein, and having interlocking directorates with Ojai Mutual Water Company. There exists a confidential and fiduciary relationship, and The Ojai Valley Company has a duty to treat minority shareholders fairly and without discrimination, and to disclose fully, which it did not do.

(h) Appellant Lucking is trying to halt further breaches. There is a continuing wrong and the threat of future and more serious wrongs.

Appellant is not trying—and has never tried—to deprive any present bona fide user of his water service, no matter how wrongful The Ojai Valley Company and Ojai Mutual Water Company may have been in giving such service initially. Further, it can be assumed that the District Court, after all the evidence is before it, will adequately protect innocent persons.

(i) The question of laches must be viewed in the light of surrounding circumstances, to be adduced on trial and upon the introduction of evidence. Mere passage of time in and of itself is not sufficient basis upon which to predicate laches.

Appellees' *eighth point* in their "Conclusion", as previously stated above, merely attempts to brand as untrue those facts which Appellees have already admitted are true for purposes of their motions to dismiss. [Tr. Rec. p. 173.]

We reiterate, we are before this Court principally on a matter of the sufficiency of the complaints. There is not one scintilla of evidence in the record to refute or contradict Appellant's allegations.

The same comment is made of the first portion of the *ninth point.*

As to the last half of the *ninth* and final point in Appellees' "Conclusion", Appellees assert that the only point toward which Appellant directed his proof was on the

matter of notice of the validity of the 1935 attempted amendment to the Articles.

Such was the only evidence *permitted* by the District Court. [Tr. Rec. pp. 183, 193.] The District Judge expressly and repeatedly limited Appellant to this one narrow issue of fact, and then granted Appellees' motions to exclude all other evidence and to dismiss the complaints. [Tr. Rec. p. 289.]

It is seen, therefore, that of the nine points which Appellees make: The first is legally incorrect; the second, third, eighth, and the first half of the ninth are completely extraneous to the issues on appeal; the fourth is based upon an assumption which is legally and factually incorrect; the fifth is overthrown by elementary arithmetic; the sixth is completely refuted seven times in the record; the seventh is not borne out by fact, law or the pleadings; and the final point made—that Appellant directed his proof only to the question of notice—is specious, and truly characterizes the entire defense of Appellees.

VII.
IN SUMMARY.

The Real Gist of These Actions Is the Matter of Control of Ojai Mutual Water Company.

Appellees repeatedly argue that control is unimportant, that "the mere fact that The Ojai Valley Company can transfer these (control) shares of stock to anyone it chooses is meaningless . . .", that The Ojai Valley Company has benevolently conducted its stewardship for many years, and the like.

But it is earnestly submitted that *control* is the root of most of the ills complained of, and makes possible the continuing and threatened wrongs with which the minority stockholders are faced.

If The Ojai Valley Company had not wrongfully, and through the device of the 1935 amendment to the Articles, perpetuated its own control.

There would have been stock assessments levied, so that each share would have contributed its own fair proportion of the capital improvements of the Company [see Art. of Incorporation, Tr. Rec. pp. 30, 31.]

All shares would have been appurtenant to specific land, rather than some shares being made appurtenant and some not, which results in practical effect in there being two classes of shares where only one class is authorized by the Articles.

There would have been no discriminatory water rates to the favored Country Club while under the ownership and management of The Ojai Valley Company.

And the minority stockholders would not now be threatened with a bulk sale of the control shares to outside interests, which would cut the available water of each shareholder down to a point where there just wouldn't be enough to go around.

After all, mutual water company stock is not to be traded on the open market like grain futures or General Motors; it should be held firmly in the hands of those who *use* the water, and whose homes depend upon the water supply. This water company is a *non-profit mutual* company. [Art. of Incorporation, Tr. Rec. pp. 30, 31.]

And corporate control should not be traded like a commodity, either, to the injury or detriment of minority stockholders. Cases like *Pepper v. Litton,* 308 U. S. 295; *Southern Pacific Company v. Bogert,* 250 U. S. 483; *Perlman v. Feldmann,* 219 F. 2d 173; *Imperial Water District No. 5 v. Holabird,* 197 Fed 4—(all previously cited in App. Op. Br.) hold that a promoter and controlling stockholder cannot, by a device, perpetuate control and use it—or threaten to use it—to the detriment of minority stockholders, particularly where these minority stockholders are, as in the case at bar, actually the grantees of this same controlling interest.

From a remedial standpoint, *Idaho Irrigation Company v. Gooding,* 265 U. S. 518 (cited in App. Op. Br.), is a landmark case, particularly when read in conjunction with the opinion of the Court of Appeals. There the Supreme Court of the United States canceled all remaining shares of the Irrigation Company which had not already been put to beneficial use, saying:

> ". . . But the Irrigation Company is without right to continue to contract to sell and deliver water from a supply that has already been exhausted, thereby compelling these owners to still further diminish their proportionate rights."

The Court of Appeals in *Pacific States Savings and Loan Corporation v. Schmitt,* 103 F. 2d 1002, held:

> "In the hands of Appellee, *these shares possess no more than a nuisance value,* but to Appellant they represent indicia of title *and the essential right to participate in management.* We perceive no good reason why Appellant should not have the relief prayed for." (That is, ownership of the shares.) (Emphasis added.)

It is sincerely urged, as stated in Appellant's Opening Brief, that there is absolutely no difference in the final result between:

1. The 1935 attempted amendment to the Articles of Incorporation of Ojai Mutual Water Company, changing four shares per acre to one share per acre, and

2. The Ojai Valley Company's causing the Water Company to issue to The Ojai Valley Company additional shares for no consideration whatsoever, so as to perpetuate its control. The latter is, of course, obviously illegal, since no preemptive rights are recognized and nothing paid for these additional control shares.

Thus, The Ojai Valley Company has indirectly by a device, caused Ojai Mutual Water Company to do something which was a fraud on the minority stockholders and which it clearly was prohibited from doing directly—whether notice of the 1935 amendment had been given or not.

Appellees have argued that this action is confiscatory. Not so, however: Appellant has never, and does not now, seek to deprive any bona fide existing user of his water service. Further, Appellant in his complaint in No. 14945 has expressly and specifically prayed that the Court take an account of any moneys owing for said Ojai Mutual Water Company's plant—and if a balance in favor of The Ojai Valley Company is found, that this payment be provided for in some equitable manner. [Tr. Rec. p. 25.] Appellant, in asking for equitable relief, is offering to do equity.

We respectfully suggest that the Court reread Exhibits "E" to "K" inclusive [Tr. Rec. pp. 91 to 104], containing illuminating correspondence between Appellant and Mr. Wilcox.

All Appellant wants is the opportunity to present his evidence to the District Court, and let the facts speak.

Thus, in equity and good conscience, the judgments of the District Court should be reversed, and the actions remanded for trial on the merits.

Respectfully submitted,

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